

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALAN CHARLES WOODEN,

Defendant-Appellee.

UNPUBLISHED

March 6, 2007

No. 266561

Shiawassee Circuit Court

LC No. 05-002325-FH

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the sentence of four months in jail and three years' probation imposed on defendant's plea based conviction of felonious assault, MCL 750.82. We vacate defendant's sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

According to the description of the offense contained in the presentence investigation report (PSIR) the victim, Norman Bosco, had been hunting with defendant at a farm.¹ Defendant had been drinking. At approximately 4:00 p.m., defendant tried to drive away in a truck that another individual had given to Bosco. When Bosco confronted defendant, defendant left the truck carrying his shotgun. He fired a deer slug at the ground, approximately three feet from Bosco, saying, "I'll put a hole in ya" and "Dance." Bosco turned and began to walk away, saying, "Ok, ok." Bosco was frightened, but did not run. Defendant then fired another shot into the ground, approximately 12 feet from Bosco. Bosco walked behind a silo and then ran. He heard two more shots, but did not know where the shots were aimed.

During sentencing, the prosecutor argued that defendant's actions justified scoring 50 points for offense variable (OV) 7 because they showed an intent to substantially increase the victim's fear and anxiety. MCL 777.37(1)(a). The trial court disagreed, but sua sponte scored OV 4, psychological injury to victim, MCL 777.34, at ten points after noting that Bosco had reported continued emotional trauma. Plaintiff moved the trial court to change the scoring of OV 7, but the trial court denied the motion.

¹ Defendant did not object to the description of the offense.

On appeal, plaintiff contends that even one discharge of the weapon at Bosco would constitute a sufficient basis for scoring OV 7 at 50 points. Plaintiff seeks a remand for resentencing.

If a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres (After Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold scoring decisions for which there is any evidence in support. *Endres, supra*; *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). We review de novo as a question of law the interpretation of the statutory sentencing guidelines. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

The trial court's comments during sentencing appear to represent a belief that, because the victim was already fearful during the attack, defendant could not enhance this fear simply by continuing the assault:

On the facts here, I think arguably as [the prosecutor] has pointed out, he could score the category of OV 7 just based on not one, but more than one shot while the victim was running. But I think that the category that only could apply would be conduct designed to substantially increase the fear as opposed to sadism or torture or excessive brutality, and if we look at the language after or "to substantially increase the fear and anxiety the victim suffered during the offense" has to presume that there was fear to start with, which I think is rather obvious in appearance here, so the incident itself I don't think arises to what would be required to score on these facts fifty (50), so I'll score it zero.

During the hearing on the prosecutor's motion for sentence correction, the trial court appeared to focus on "sadism" under the variable to again determine that defendant's actions did not rise to the level necessary to support a score of 50 points:

I'm still persuaded that the essence of the charge here is what occurred and the discharge of the shotgun as well as--I think it was a shotgun, as well as the statements of the defendant are what give rise to the scoring that--the very charge, excuse me, the essence of the charge and then the scoring on the part of this Court. Would it be possible--and I'm not saying it's impossible or that there are no facts or circumstances on the felonious assault, that would justify a 50 scoring on OV 7, but the definitions given relative to sadism, for example conduct subjects the victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification. Torture I don't think is necessarily implicated here.

And I suppose we could all come up with different examples of what would amount to the type of sadism that would enhance or elevate the scoring up to 50 points. Blindfolding the victim, maybe tied up and discharging a firearm or

having an unloaded firearm holding it to the victim and clicking it at one's forehead, you know, all those things I suppose would be examples and both of you could come up with a lot more examples that would amount to sadism or torture to justify that type of scoring.

Here, I--I think that the Court scored it correctly. I understand that maybe other courts would score it differently but on the totality of the facts that were presented here, I think that it is scored properly and I will deny the motion.

Plaintiff argues that the trial court misinterpreted the language of MCL 777.37, and that the trial court was required to determine that defendant's actions were substantially designed to increase Bosco's fear, thus requiring a score of 50 points for OV 7. In contrast, defendant argues that the trial court's decision was a proper discretionary determination that his conduct did not fall within that necessary to score 50 points for OV 7. Underlying these arguments is a disagreement about the applicable standard of review. See *Babcock*, *supra* at 253; *Endres*, *supra* at 417.

We find that the trial court's comments during the initial sentencing, while ambiguous, indicate that the trial court was operating under a legal misconception. MCL 777.37 does not require a showing that the victim's fear was due solely to a defendant's actions. Instead, the trial court could have determined that, while Bosco was in fear because defendant fired at the ground in his initial confrontation, defendant's other shots, and his threats, were designed to substantially increase Bosco's initial fear.

Even were we to agree with the trial court that the actions that form the essential elements of the offense should not count toward determining whether scoring under OV 7 is appropriate, plaintiff correctly notes that defendant's actions were more than what was required to commit the crime charged. The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is an attempt to commit a battery, or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Here, the initial shot satisfied these elements. Therefore, to the extent the trial court's decision rested on a finding that all defendant's actions were necessary to establish the charged crime, the decision was based on an incorrect interpretation of the law.

The trial court's statement during resentencing that defendant's actions did not rise to what it would consider "sadism" or "torture" is closer to a decision that would not ordinarily constitute an abuse of discretion. However, the trial court did not specifically review defendant's actions under the broader language of "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Contrary to plaintiff's argument, the trial court could reasonably have found that scoring OV 7 at 50 points was inappropriate.² However, under

² The trial court could, for example, determine that defendant's actions did not rise to a deliberate attempt to substantially increase the fear and anxiety of the victim, but were simply due to defendant's intoxicated lack of control. Such a finding would be within its discretion.

the circumstances, we remand for resentencing. We note that the trial court remains free to continue the current sentence if it deems it appropriate.³

Defendant's sentence is vacated, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder

³ We note that defendant's total OV score, after the trial court added ten points for OV 4, was 40 points. Coupled with defendant's prior record variable score of 20 points, this placed defendant into the C III cell. For defendant's class F offense, this resulted in a sentence range of two to 17 months, and represented an intermediate sanction cell. If defendant were rescored with 50 additional OV points, he would fall within the C IV grid, with a recommended sentence range of five to 23 months. This represents a straddle cell. MCL 777.67. A removal of the ten points for OV 4 would not change this result.